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IN THE

Supreme Court of the United States

No. 377.

OCTOBER TERM, 1935.

ASA H. WHITFIELD,

Petitioner,

vs.

THE STATE OF OHIO.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

Petitioner here seeks a writ of certiorari as set forth in his petition, relying upon the point that the Hawes-Cooper Act of Congress (45 Stat. at L. 1084; Chapt. 79, U. S. C. Title 49, Sec. 65) is not authorized by the inter-

state commerce clause or by any other provision of the Constitution of the United States, and that in the trial and conviction of the petitioner he was thus denied due process of the law and equal protection of the laws. Petitioner also relies upon the point that the Ohio statutes, Sections 2228-1 and 2228-2 of the General Code of Ohio, prohibiting the sale in the open market in Ohio of prison made goods made in other states, thus placing such goods under the same restrictions as those so made in Ohio, is in conflict with the interstate commerce clause of the Constitution of the United States (Article I, Section 8, Clause 3).

Obviously, if the Hawes-Cooper Act is invalid, the Ohio statutes must fall, and obviously if the Hawes-Cooper Act is invalid, petitioner was denied due process of law and equal protection of the laws. The one basic point then upon which petitioner relies is the constitutionality of the Hawes-Cooper Act.

Alabama is here making a second attempt to invalidate this act,—the first having been made in Alabama v. Arizona, et al., 291 U. S., 286, 292, wherein Alabama, was denied leave to file bill of complaint against nineteen states, including respondent state. In that application and brief filed in support thereof, opposing counsel set forth all arguments now advanced in support of the petition here.

ARGUMENT.

Point 1. Granting of petition discretionary.

Point 2. Validity of Hawes-Cooper Act has been settled by this court.

POINT 1.

Granting of Petition Discretionary.

A review of the decision of the Supreme Court of Ohio by this court is entirely within its sound judicial discretion and will be granted only where there is a showing of a special and important reason therefor. Rule 35, Section 5. In the instant case, the one substantive question of law involved has already been determined by this court adversely to the contentions of petitioner, as will be hereinafter shown; and there is accordingly no showing made to justify the granting of the writ of certiorari prayed for by petitioner.

POINT 2.

Validity of Hawes-Cooper Act Has Been Settled by This Court.

The Hawes-Cooper Act, leaving to the states the question of the sale in the open market of prison made goods and affording protection to those states which prohibit such sale from the inroads of such goods imported from

other states is substantially identical in its terms and purpose with the Wilson Act, 26 Stat., 313, c. 728, which made the same provision with respect to intoxicating liquor in states which prohibited the sale of such commodity. The Wilson Act was attacked as to constitutionality and upheld by this court in the case of Wilkerson v. Rahrer, 140 U. S., 545. The decision in this case has been so repeatedly approved and followed by this court beginning with Plumley v. Massachusetts, 155 U. S., 461, and ending with James Clarke Distilling Co. v. Western Maryland Ry. Co., 242 U. S., 211, that it is unnecessary here to quote the pertinent language of the decision. It is sufficient to direct the court's attention to the first, fifth and sixth branches of the headnotes:

> "1. The Act of Congress of August 8, 1890, that intoxicating liquors transported into a state or territory shall be subject to the laws of the state or territory enacted in the exercise of its police powers, is constitutional and valid.
>
> 5. Congress has power to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier time than would otherwise be the case.
>
> 6. Congress had the power to enact the law of August 8, 1890, and in doing so it has not attempted to delegate the power to regulate commerce, nor to exercise any power reserved to the states."

The petitioner attempts to sustain the position that since the prison made work shirts in question are not in themselves "harmful, injurious or deleterious", that therefore the Rahrer case, supra, is not controlling. Petitioner cites many decisions of this court in which he

apparently recognizes that the power delegated to Congress to regulate commerce was subject to the reserved police powers of the state and that Congress had authority to permit a state to prohibit the sale within its boundaries of any article in interstate commerce which endangered "the welfare or the morals of its people". The assumption appears to be that since prison made goods may not in themselves be exceptional in their nature that therefore the sale in the open market of such goods imported from without the state, into a state where the products of its own prisons may not be so sold, presents no exceptional situation which Congress might have the power to remedy. A mere statement of the proposition refutes its validity. Had there been no previous recognition by this court of the necessity of safeguarding the freedom of labor, the petitioner might be said to be presenting here a case of first instance. But in Baily v. Alabama, 219 U. S., 219, this court unequivocally expressed itself upon that matter, wherein it is said that:

> "There is no more important concern, than to safeguard the freedom of labor upon which alone can enduring prosperity be based."

That interstate commerce in prison made goods is a proper subject of regulation by Congress, where Congress does not, as in the case here, usurp state police powers, but rather enables them to be effectual, is no longer debatable.

In Brooks v. United States, 267 U. S., 432, this court upheld an act forbidding the transportation in interstate

commerce of a motor vehicle known to have been stolen. It could be said with equal lack of force as contended by petitioner that there is "nothing harmful, injurious or deleterious" about a perfectly good motor vehicle just because it has been stolen.

Again, in Champion v. Ames, 188 U. S., 321, this court held constitutional an act prohibiting the transportation in interstate commerce of lottery tickets. Like prison made shirts, there is "nothing harmful, injurious or deleterious" about a lottery ticket in itself. The harm recognized by this court arises from the use to which such tickets are put. In the instant case the harm arises from the use to which these prison made shirts are put, to wit, their sale in Ohio in competition with such merchandise made by free labor, and in violation of the state statutes relating thereto, thus rendering ineffectual the benefits sought to be accomplished by the state in the valid exercise of its police power in protecting its industries and regulating its prisons. The case of the apparently harmless ticket and the apparently harmless shirt may not be distinguished.

Again, in the case of State, ex rel., Silz, v. Hesterberg, 211 U. S., 31, we have the same restriction upheld as to game birds and animals. The decisions of this court sustaining the constitutionality of the Hawes-Cooper Act leave its validity no longer open to question.

This court in Brooks v. United States, supra, clearly established the power of Congress to enact the Hawes-Cooper Act in the following language:

> "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the

> use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce." (Boldface ours.)

Petitioner relies chiefly upon the so-called Child Labor case, Hammer v. Dagenhart, 247 U. S., 251, in which this court held invalid an Act of Congress which "aims to standardize the ages at which children may be employed in mining and manufacturing within the states" (39 Stat. at L. 675, Chap. 632), regardless of the laws of any states from which or into which such products were to be shipped. The distinction between that act and the Hawes-Cooper Act here under consideration is apparent on its face. This court was not there concerned with an act which subjected goods made by child labor to the laws of the states into which they were shipped, and no state prohibited the sale on the open market of such goods. Had the act which Congress there had under consideration so provided, there might be some analogy drawn here. The Child Labor Act there held unconstitutional, however, prohibited the transportation in interstate commerce of goods made by child labor, thus prohibiting the sale of such goods in all states, regardless of state regulation thereof, and thus usurping a state function. The Child Labor Act itself set up the standard of labor, thus usurping a purely local state power. That this was the controlling element of the majority decision

of this court is evident. At the outset of the majority opinion it is said at page 269:

> "The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the states to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work, more than eight hours in any day, or more than six days in any week, or after the hour of 7 o'clock p. m. or before the hour of 6 o'clock a. m.?"

Throughout the opinion, the decision of this court is grounded upon the attempt of Congress to usurp a state function and destroy a state power which it was powerless to do. It is sufficient to direct the court's attention to the following language:

> "The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. * * *
>
> The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.
>
> The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution. * * *
>
> And in Dartmouth College v. Woodward, 4 Wheat., 518, 629, the same great judge (Marshall) said:
>
> 'That the framers of the Constitution did not in-

tend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted."

* * * * * * * * * * * *

The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal powers in all matters intrusted to the nation by the Federal Constitution.

* * * * * * * * * * * *

To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.

* * * * * * * * * * * *

In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states,—a purely state authority."

It is submitted that the foregoing case, if at all pertinent, directly supports the constitutionality of the Hawes-Cooper Act. The Hawes-Cooper Act supports the authority of the states over matters purely local; it does not usurp that authority. It does not restrain the states in the regulation of their own industries but assists those which seek to protect the general welfare of their people by prohibiting the sale of prison made goods from the influx in interstate commerce of such goods from other

states which do not see fit to so protect their people and regulate their prisons. The Hawes-Cooper Act accordingly removes an impediment in the enforcement of such state laws, just as did the Wilson Act. In the Rahrer case, supra, this court said as to this, at page 564:

> "Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

The Child Labor Tax case, 259 U. S., 20, needs no extended comment other than to say that the case is in the same category as Hammer v. Dagenhart, supra. The court expressly held that it could not be distinguished from that case, since the Child Labor Tax Law there under consideration constituted an attempt by Congress "to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the federal Constitution."

Petitioner also raises the question of invalid delegation of power by Congress. This point was raised in the cases of Wilkerson v. Rahrer, supra, and Silz v. Hesterberg, supra, and completely disposed of. It is unnecessary to comment upon this point further than to say that it has been decided adverse to petitioner and is no longer subject to debate.

CONCLUSION.

The harm or evil or the demoralizing effect of the unrestricted sale of prison made goods in those states which have in the valid exercise of their police power prohibited the sale of such goods, the fact that the prohibition of the sale of prison made goods is within the police power of the states, and the wisdom or expediency of legislation being matters solely for the Legislature, are points which have all been recently presented to this court in the brief of the attorney general of Montana in the case of Alabama v. Arizona, supra, and it is accordingly believed to be unnecessary to unduly lengthen this brief by citing the decision of this and other courts in support thereof.

Attention should be directed to the fact that the Supreme Court of Ohio is not the only state court of last resort which has considered the validity of the Hawes-Cooper Act to be no longer open to question. The Supreme Court of Wisconsin on December 4, 1934, in the case of State v. Whitfield, 257 N. W., 601, considered this question and sustained its validity.

The court's attention is also respectfully invited to the decision of the Ohio Court of Appeals of the Eighth Appellate District of Ohio quoted in full in petitioner's brief sustaining the constitutionality of the Hawes-Cooper Act upon well grounded decisions of this court. It follows that the Ohio statute must necessarily constitute a valid exercise of the police power of the state.

It is submitted in conclusion that the Supreme Court of Ohio dismissed the petition in error filed therein seeking a review of the decision of the Court of Appeals "**for the reason no debatable constitutional question is involved in said cause.**" Transcript of record, page 29. The court of last resort of Ohio considered the question of the constitutionality and validity of the laws here under attack to be so well established as to be not debatable and to not justify a written opinion.

It is respectfully submitted, therefore, that the petition for a writ of certiorari to the Supreme Court of Ohio should be dismissed.

Respectfully submitted,

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